

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

BRENT MCFARLAND,

Plaintiff,

v.

BNSF RAILWAY COMPANY,

Defendant.

No. 4:16-CV-5024-EFS

**ORDER DENYING DEFENDANT BNSF'S
MOTION TO DISMISS UNDER FED. R.
CIV. P. 12(B)(1) AND 12(B)(6)**

After working for BNSF Railway Company for many years, Plaintiff Brent McFarland claims he was wrongfully discharged in violation of public policy for filing a grievance and subsequent lawsuit against BNSF to recover for a workplace injury. BNSF seeks dismissal of this lawsuit because 1) Mr. McFarland's state-law wrongful-discharge tort claim is preempted by the Railway Labor Act (RLA), 45 U.S.C. §§ 151 *et seq.*, and 2) Mr. McFarland is collaterally estopped from re-litigating that his termination was based on Collection Bargaining Agreement (CBA) Rule 16(f). Mr. McFarland maintains his state-law claim is not preempted and that he is not collaterally estopped from seeking relief under Washington state law. After reviewing the record and relevant legal authority, the Court denies BNSF's motion to dismiss.

1 **A. Factual Statement¹**

2 Mr. McFarland worked for BNSF for over 15 years, beginning as a
3 carman apprentice and a journeyman railroad carman. As a union employee,
4 his employment relationship with BNSF was governed by the CBA, ECF No.
5 9-1. During his employment with BNSF, Mr. McFarland also worked for his
6 father's company, RJ Mac. Both exempt and scheduled BNSF employees at
7 the Pasco site knew that Mr. McFarland worked for his father's company
8 as well.

9 In 2009, Mr. McFarland suffered an on-the-job injury to his right
10 shoulder while working for BNSF. He tried to informally resolve his
11 injury claim with BNSF but was unsuccessful. Mr. McFarland then filed
12 a lawsuit against BNSF under the Federal Employers Liability Act (FELA),
13 seeking to recover damages for his injury. Trial was held. Mr. McFarland
14 testified. During his testimony, Mr. McFarland stated that he worked
15 for RJ Mac while on leaves of absence from BNSF in 2003 and 2004. The
16 jury decided in BNSF's favor on Mr. McFarland's FELA claim.

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19 ¹ The "factual statement" is based on the factual allegations in the
20 Complaint, ECF No. 1-2, and the CBA, ECF No. 9-1. See *Ashcroft v. Iqbal*,
21 556 U.S. 662, 678-79 (2009); *United States v. Ritchie*, 342 F.3d 903,
22 908 (9th Cir. 2003) (When considering a motion to dismiss, "[a] court
23 may . . . consider certain materials—documents attached to the
24 complaint, documents incorporated by reference in the complaint, or
25 matters of judicial notice.").
26

1 Soon after post-trial motions, which were decided in BSNF's favor,
2 BNSF terminated Mr. McFarland. BNSF advised that it terminated Mr.
3 McFarland because he violated the CBA by working for RJ Mac while on
4 leaves of absence from BNSF in 2003 and 2004—nine years prior thereto:

5 Employees accepting other compensated employment while on
6 leave of absence without first obtaining permission from the
7 officer in charge and approved by the General Chairman shall
8 be considered out of service, and their names shall be removed
9 from the seniority roster.

10 CBA Rule 16(f), ECF No. 9-1. When Mr. McFarland confronted his prior
11 boss at BNSF, Ryan Risdon, Mr. Risdon stated, "What do you expect. You
12 got the ball rolling, [sic] It is your fault for bringing a lawsuit
13 against the company." BNSF did not terminate similarly situated
14 employees who worked for outside companies.

15 The Union filed a grievance, on Mr. McFarland's behalf, challenging
16 his discharge under Rule 16(f). The grievance was handled between BNSF
17 and the Union pursuant to CBA Rule 34, ECF No. 9-1, with BNSF apparently
18 prevailing as to its position that Mr. McFarland violated Rule 16(f)
19 and therefore his discharge was appropriate. In January 2015, the Union
20 informed Mr. McFarland that it did not intend to pursue arbitration of
21 his grievance.

22 Mr. McFarland then filed this lawsuit, alleging that BNSF's
23 proffered reason for terminating him—CBA Rule 16(f)—was merely a pretext
24 for the true basis for his termination, which was in retaliation for
25 filing a grievance and then FELA lawsuit seeking to recover for his
26 worksite injury. The claim asserted is a state-law tort claim of
27 wrongful discharge in violation of Washington's public policy against

1 discharging an employee for exercising a legal right or privilege, or
2 for engaging in whistleblowing activity.

3 BNSF removed this lawsuit from state court and then filed a motion
4 to dismiss under Federal Rule of Civil Procedure 12(b)(1) and (6).
5 Briefing ensued.

6 **B. Standard**

7 Rule 12(b)(1) provides that an action must be dismissed for lack
8 of subject-matter jurisdiction. The party filing the lawsuit in federal
9 court—the plaintiff in a lawsuit that was initially filed in federal
10 court and the defendant in a lawsuit that was removed to federal court—
11 bears the burden of establishing subject-matter jurisdiction. *Stock W.,*
12 *Inc. v. Confederated Tribes*, 873 F.2d 1221, 1225 (9th Cir. 1989); *Gaus*
13 *v. Miles, Inc.*, 980 F.2d 564, 566 (9th Cir. 1992).

14 A motion to dismiss under Rule 12(b)(6) tests the legal sufficiency
15 of the pleadings. *Navarro v. Block*, 250 F.3d 729, 732 (9th Cir. 2001).
16 A complaint may be dismissed for failure to state a claim under Rule
17 12(b)(6) where the factual allegations do not raise the right to relief
18 above the speculative level. *Ashcroft v. Iqbal*, 556 U.S. 662, 678-79
19 (2009); *Bell Atl. v. Twombly*, 550 U.S. 544, 555 (2007). Conversely, a
20 complaint may not be dismissed for failure to state a claim where the
21 allegations plausibly show that the pleader is entitled to relief.
22 *Twombly*, 550 U.S. at 555. In ruling on a motion under Rule 12(b)(6), a
23 court must construe the pleadings in the light most favorable to the
24 plaintiff and accept all material factual allegations in the complaint,
25 as well as any reasonable inferences drawn therefrom. *Broam v. Bogan*,
26 320 F.3d 1023, 1028 (9th Cir. 2003).

1 **C. Authority and Analysis**

2 BNSF seeks dismissal for two reasons: first, under Rule 12(b)(1)
3 for lack of subject-matter jurisdiction because this lawsuit involves
4 a CBA minor dispute and is therefore preempted by the Railway Labor Act
5 (RLA), 45 U.S.C. §§ 151 *et seq.*; and second, under Rule 12(b)(6) because
6 Mr. McFarland is collaterally estopped from challenging the application
7 of CBA Rule 16(f), as interpreted by BNSF, to his claim in this lawsuit.
8 The Court begins with the subject-matter jurisdiction question of
9 preemption under the RLA.

10 The RLA established a system to handle disputes "growing out of
11 grievances or out of the interpretation or application of agreements
12 concerning rates of pay, rules, or working conditions" for the railway
13 and airline industry. *Hawaiian Airlines v. Norris*, 512 U.S. 246, 248
14 (1994) (quoting 45 U.S.C. § 153 First (i)). The purpose was to "promote
15 stability in labor-management relations by providing a comprehensive
16 framework for resolving labor disputes." *Id.* at 252. To accomplish this
17 purpose, the RLA requires mandatory arbitration for two types of
18 disputes: major disputes (those concerning "rates of pay, rules or
19 working conditions") and minor disputes (those which "gro[w] out of
20 grievances or out of the interpretation or application of agreements
21 covering rates of pay, rules, or working conditions." *Id.* at 252-53
22 (quoting § 151a). BNSF contends that Mr. McFarland's claim is a minor
23 dispute as it requires the interpretation of CBA Rule 16(f) and that
24 his claim is therefore preempted by the RLA.

25 RLA preemption of state-law claims is not to be lightly inferred.
26 *Hawaiian*, 512 U.S. at 252. To ensure that RLA preemption is not lightly

1 inferred, a two-step analysis is used. If both of the following
2 questions are answered in the affirmative, then the state-law claim can
3 proceed: first, does the asserted cause of action involve a right
4 conferred on the employee by virtue of state law, not the CBA; and
5 second, can the state-law claim be resolved by looking to, rather than
6 interpreting, the CBA. *Burnside v. Kiewit Pac. Corp.*, 491 F.3d 1053,
7 1059 (9th Cir. 2007) (setting forth test in the confines of a Labor
8 Management Relations Act (LMRA) case²) (citing *Caterpillar, Inc. v.*
9 *Williams*, 482 U.S. 386, 394 (1987)); *Hawaiian Airlines*, 512 U.S. at 260-
10 61 (involving the scope of preemption under the RLA).

11 At the first step, the Court finds that Mr. McFarland's wrongful-
12 discharge claim is independent of the CBA: it is based on Washington
13 public policy. Washington courts recognize a "public policy tort in
14 recognition that the at-will doctrine gives employers potentially
15 'unfettered control of the workplace and, thus, allows the employer to
16 take unfair advantage of its employees.'" *Rickman v. Premera Blue Cross*,
17 184 Wn.2d 300, 309 (2015) (quoting *Thompson v. St. Regis Paper Co.*, 102
18 Wn.2d 219, 226 (1984)). To prove Washington's state-law tort of wrongful
19 discharge, an employee must establish 1) the existence of a clear public
20 policy, 2) that discouraging the conduct in which the employee engaged
21 would jeopardize the public policy, and 3) that the public-policy-linked
22 conduct caused the dismissal. *Id.* at 310. As to the first element, the

24 ² The Supreme Court recognizes that the preemption standard under the RLA is
25 virtually identical to the preemption standard in LMRA cases. *Hawaiian*
26 *Airlines*, 512 U.S. at 263.

1 Washington Supreme Court has recognized that the tort of wrongful
2 discharge extends to a claim that an employer retaliated against the
3 employee for whistleblowing activity, *Dicomes v. State*, 113 Wn.2d 612
4 (1989), and for obtaining legal assistance to confront the employer's
5 unlawful discrimination, *Bennett v. Hardy*, 113 Wn.2d 912, 924 (1990).
6 To establish causation, the employee need not prove that the employer's
7 sole motivation was retaliation; instead, the employee must produce
8 evidence that his actions in furtherance of the public policy was a
9 substantial factor motivating the employer's discharge decision.
10 *Rickman*, 184 Wn.2d at 314; Wash. Pattern Jury Instr. Civ. 330.01.01 &
11 Comments. Once the employee establishes these *prima facie* elements, the
12 employer has the burden of establishing that the termination was
13 justified by an overriding legitimate consideration. *Gardner v. Loomis*
14 *Armored, Inc.*, 128 Wn.2d 931, 940 (1996).

15 Washington's public policy against discharging an employee for
16 protected activity is a substantive protection provided by Washington
17 state tort law, which is separate from any rights provided by the CBA.
18 See *Hawaiian Airlines*, 512 U.S. at 258-59 ("Wholly apart from any
19 provision of the CBA, petitioners had a state-law obligation not to fire
20 respondent in violation of public policy or in retaliation for
21 whistleblowing."). Mr. McFarland's *prima facie* claim of wrongful
22 discharge in violation of Washington public policy requires a purely
23 factual inquiry into BNSF's alleged retaliatory termination decision.
24 See *id.* at 266. Accordingly, the Court finds the asserted claim involves
25 a right conferred on Mr. McFarland by virtue of state law, not the CBA.
26 Cf. *Andrews v. Louisville & Nashville R. Co.*, 406 U.S. 320 (1972)

1 (finding that wrongful-discharge claim was dependent upon contractual
2 rights created by the CBA).

3 The second preemption-analysis step focuses on whether the court
4 or jury must merely "look to" the CBA (no preemption) or whether
5 interpretation of the CBA is required (preemption). This distinction is
6 "not always clear or amendable to a bright-line test." *Cramer v.*
7 *Consolidated Freightways, Inc.*, 255 F.3d 683, 691 (9th Cir. 2001). And
8 here the line is not crystal clear. But the Court determines, based on
9 Mr. McFarland's claim and legal arguments in support thereof, that his
10 wrongful-discharge claim merely "looks to" rather than requires
11 interpretation of the CBA.

12 Because Mr. McFarland's employment relationship with BNSF was
13 governed by the CBA, it is uncontested that the CBA will be discussed
14 and referred to. However, as set forth above, the elements that Mr.
15 McFarland must prove in order to establish a *prima facie* case of wrongful
16 discharge in violation of Washington public policy for having pursued
17 a grievance and subsequent litigation for a workplace injury do not
18 require interpreting the CBA, or more specifically CBA Rule 16(f). If
19 Mr. McFarland is able to establish a *prima facie* case of wrongful
20 discharge, it is certain that BNSF will argue that its termination
21 decision was based solely on Rule 16(f). Yet, so long as Mr. McFarland
22 does not challenge BNSF's interpretation of Rule 16(f), the jury may
23 look to Rule 16(f)—as interpreted and applied by BNSF—and consider the
24 evidence presented by Mr. McFarland that BNSF's proffered reason was
25 merely a pretext, such as evidence that BNSF officials knew of his RJ
26 Mac work in advance of his grievance and subsequent litigation and that

1 other individuals who engaged in non-BNSF work while on a leave of
2 absence were not fired. *See Miglio v. United Airlines*, No. C13-573RAJ,
3 2014 WL 1089285, at *5 (W.D. Wash. March 17, 2014) (“[T]o pursue his
4 [discrimination] claim successfully, he does not have to dispute
5 United’s interpretation of the CBA. He could concede that the CBA
6 mandated his termination and nonetheless contend that United terminated
7 him because of his disability in violation of Washington law.”).
8 Accordingly, Rule 16(f) need not be interpreted in order for the
9 wrongful-discharge-in-violation-of-public-policy claim to be resolved.
10 *See Lingle v. Norge Div. of Magic Chef, Inc.*, 486 U.S. 399, 413 & n.12
11 (1988) (“In a typical case a state tribunal could resolve either a
12 discriminatory or retaliatory discharge claim without interpreting the
13 ‘just cause’ language of a collective-bargaining agreement.”);
14 *Burnside*, 491 F.3d at 1071-72 (recognizing that looking to and examining
15 CBA provisions in order to resolve a state-law claim does not result in
16 preemption).

17 Accordingly, the Court finds Mr. McFarland’s wrongful-discharge
18 claim is not preempted by the RLA. BNSF’s motion to dismiss is denied
19 in this regard.

20 Next, BNSF argues that Mr. McFarland fails to state a claim for
21 relief because he is collaterally estopped from challenging BNSF’s Rule
22 16(f) termination as he pursued a grievance under the CBA procedures,
23 and therefore dismissal under Rule 12(b)(6) is required. In response,
24 Mr. McFarland argues that the Union and BNSF’s grievance procedure was
25 not sufficiently extensive as to permit the application of collateral
26 estoppel.

1 Under Washington law, collateral estoppel³ requires the party
2 seeking preclusion to establish that:

3 (1) the issue decided in the earlier proceeding was identical
4 to the issue presented in the later proceeding, (2) the
5 earlier proceeding ended in a judgment on the merits, (3) the
6 party against whom collateral estoppel is asserted was a party
to, or in privity with a party to, the earlier proceeding,
and (4) application of collateral estoppel does not work an
injustice on the party against whom it is applied.

7 *Christensen v. Grant Cnty. Hosp. Dist. No. 1*, 152 Wn.2d 299, 307 (2004).

8 An "issue" to which collateral estoppel applies may be one of law,
9 evidentiary fact, or the application of law to fact. Restatement
10 (Second) of Judgments § 27(c) (1982). Whatever the type of issue, it
11 must have been actually litigated and determined and that determination
12 must be essential to the judgment in order for litigation of that issue
13 to be collaterally estopped in a later action. *Christensen*, 152 Wn.2d,
14 at 307; Restatement (Second) of Judgments § 27(f)-(h) (1982); Moore's
15 Federal Practice - Civil § 132.02.

16 The Court determines that collateral estoppel should not apply at
17 this time. The information before the Court does not identify that the
18 grievance proceeding was such a proceeding that Mr. McFarland, or the
19 Union on his behalf, actually litigated what the true basis for Mr.
20 McFarland's termination was. More pointedly, there is no information
21 that the Union, on Mr. McFarland's behalf, presented evidence, called
22 witnesses, made an opening or closing statement, submitted briefs, or

24 ³ Collateral estoppel may apply to an issue in a wrongful-discharge in violation
25 of public policy case. *Christensen v. Grant Cnty. Hosp. Dist. No. 1*, 152 Wn.2d
26 299, 313 (2004).

1 otherwise litigated whether Mr. McFarland's discharge was appropriate
2 under Rule 16(f); there is no information as to what legal standard, if
3 any, was applied during the CBA Rule 34 grievance proceeding; and the
4 Court was not provided a copy of any written decision or transcript from
5 an oral proceeding in which rulings were made. *See Cloud ex rel. Cloud*
6 *v. Summers*, 98 Wash. App. 724, 734-35 (1999) (finding collateral
7 estoppel inappropriate where the legal standards were substantially
8 different); *cf. Christensen*, 152 Wn.2d at 316-17 (discussing that the
9 union's lawyer made an opening statement, called and cross-examined
10 witnesses, offered exhibits, objected to evidence, and submitted post-
11 hearing briefing). Based on the record, Mr. McFarland did not have a
12 full and fair opportunity to present his case that he was wrongfully
13 discharged for pursuing a workplace-injury grievance and subsequent
14 lawsuit. *See Lutheran Day Care v. Snohomish Cnty.*, 119 Wn.2d 91, 114
15 (1992) (Collateral estoppel "prevents the relitigation of an issue or
16 determination of fact after the party sought to be estopped has had a
17 full and fair opportunity to present his or her case."). Application of
18 collateral estoppel would work an injustice on Mr. McFarland.

19 Accordingly, the Court denies BNSF's motion to dismiss pursuant
20 to Rule 12(b)(6) because collateral estoppel does not apply: Mr.
21 McFarland is not estopped from challenging BNSF's proffered basis for
22 his termination through his state-law wrongful-discharge tort claim.

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1 **D. Conclusion**

2 For the above given reasons, **IT IS HEREBY ORDERED:** BNSF's Motion
3 to Dismiss under Fed. R. Civ. P. 12(b)(1) and 12(b)(6), **ECF No. 7**, is
4 **DENIED.**

5 **IT IS SO ORDERED.** The Clerk's Office is directed to enter this
6 Order and provide copies to all counsel.

7 **DATED** this 5th day of May 2016.

8
9 s/Edward F. Shea

EDWARD F. SHEA

Senior United States District Judge